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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 STEVEN M. COLOSIMO and
13 NATHANIEL A. PORTEOUS,
14 individuals, on behalf of themselves and all
15 other similarly situated employees,

16 Plaintiffs,

17 vs.

18 PRINCE TELECOM, LLC, a Delaware
19 limited liability company; and DOES 1
20 through 10, inclusive,

21 Defendants.

CASE NO.: 2:19-cv00647

22 **OPPOSITION TO**
23 **DEFENDANT'S MOTION TO**
24 **DISMISS PLAINTIFFS'**
25 **COLLECTIVE AND CLASS**
26 **ACTION COMPLAINT, AND**
27 **MOTION TO AMEND**

28 **[Hearing Requested]**

29 COME NOW Plaintiffs, STEVEN M. COLOSIMO and NATHANIEL A.
30 PORTEOUS, individuals, on behalf of themselves and all other similarly situated
31 employees, by and through their counsel, MADDOX | ISAACSON | CISNEROS LLP,
32 and hereby submit this Opposition to Defendant's Motion to Dismiss Plaintiffs'
33 Collective and Class Action Complaint, and Motion to Amend.

34 This Opposition and Motion are based on the following Memorandum of
35 Points and Authorities, all pleadings and papers on file herein, and on such oral
36 argument and documentary evidence that may be presented at any oral hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant does not deny that it implemented a *de facto* piecework-without-minimum wage/overtime system, or forced Plaintiffs to forego or interrupt meal periods, or failed to pay Plaintiffs for all time worked, among other things. *See* ECF No. 8 at 2:20 – 3:12. Instead, Defendant has moved to dismiss on the basis that allegedly, Plaintiffs “fail to allege any workweek or other calculable example” for the Court to determine whether minimum wage and/or overtime was properly paid. *Id.* at 3:13-21. Defendants cite *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014) for the proposition that the federal pleading standards established by *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) require such examples. *Id.* at 5:21 – 6:12. Defendants further argue that the Court has supplemental jurisdiction over Plaintiffs’ state law claims, *see id.* at 9:20-24, and that Nevada state law wage claims heard in federal court are subject to the same heightened pleading standard. *Id.* at 10:4-5.

Further pending before the Court is Plaintiffs’ Motion to Amend and Remand (ECF No. 11, 12, and 13). Therein, Plaintiffs requested leave to amend their Complaint, removing all federal claims, and remanding to state court. The Court should grant the Motion to Amend and Remand, and deny Defendant’s Motion to Dismiss as moot. In the alternative, Plaintiffs oppose the Motion to Dismiss, and further in the alternative, seek leave to further amend for the purpose of addressing any concerns the Court may have.

I. RELEVANT FACTUAL ALLEGATIONS

In this class action, Plaintiffs have asserted wage and hour violations under federal and Nevada law. Six of the eight claims brought by Plaintiffs were made under Nevada state law, as follows:

- 1) Failure to pay minimum wages in violation of the Nevada Constitution;
- 2) Failure to compensate for all hours worked in violation of NRS §§ 608.140 and 608.016;

- 3) Failure to pay overtime in violation of NRS §§ 608.140 and 608.018;
- 4) Failure to timely pay all wages due and owing in violation of NRS §§ 608.140 and 608.020-050;
- 5) Failure to provide meal periods in violation of NRS §§ 608.140 and 608.019; and
- 6) Failure to provide rest periods in violation of NRS §§ 608.140 and 608.019.

Two claims made under federal law, namely:

- 1) Failure to pay wages for all hours worked in violation of the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq.; and
- 2) Failure to pay overtime in violation of the Fair Labor Standards Act, 29 U.S.C. § 207.

II. LEGAL STANDARD FOR MOTION TO DISMISS

Federal Rule of Civil Procedure 8(a)(2) states that a complaint should contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Each allegation must be “simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). Detailed factual allegations are not required.” *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Aschcroft v. Iqbal*, 556 U.S. 678, 129 S.Ct. 1937, 1949 (2009).

III. LEGAL STANDARD FOR LEAVE TO AMEND

Fed. R. Civ. P. 15(a)(2) provides that “[t]he court should freely give leave [to amend] when justice so requires.” The Supreme Court has interpreted Rule 15(a)(2) and confirmed the liberal standard district courts must apply when granting such leave:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure

1 to cure deficiencies by amendments previously allowed, undue prejudice
 2 to the opposing party by virtue of allowance of the amendment, futility
 3 of the amendment, etc.—the leave sought should, as the rules require, be
 ‘freely given.’

4 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962).

5 **IV. LEGAL ARGUMENT**

6 Defendant alleges that Plaintiffs’ minimum wage and overtime claims under
 7 the FLSA must be dismissed under *Landers v. Quality Communications, Inc.*, 771 F.3d
 8 638, 640 (9th Cir. 2014), *as amended* (Jan 26, 2015). ECF No. 8 at 5:23 – 6:3. In
 9 *Landers*, the court determined that in order to survive a motion to dismiss FLSA
 10 claims under *Twombly* and *Iqbal*, “a plaintiff asserting a claim to overtime payments
 11 must allege that she worked more than forty hours in a given workweek without
 12 being compensated for the overtime hours worked during at workweek.” *Landers*,
 13 771 F.3d at 644-45. A plaintiff could meet the *Twombly* and *Iqbal* standard by
 14 “estimating the length of her average workweek during the applicable period and the
 15 average rate at which she was paid, the amount of overtime wages she believes she is
 16 owed, or any other facts that will permit the court to find plausibility.” *Id.* at 645.

17 First, the Court should grant Plaintiffs’ Motion to Amend and Remand, and
 18 render Defendant’s Motion to Dismiss moot.

19 Second, and in the alternative, the Court should deny the Motion to Dismiss
 20 on the merits. On February 28, 2019, Plaintiffs filed this action in the Eighth Judicial
 21 District, Clark County, Nevada. The heightened particularity required in *Landers* does
 22 not comport with *Twombly*, as the kind of details required in *Landers* – time, date, and
 23 place, are details required for fraud claims, under Fed. R. Civ. P. 9. Specifically,
 24 *Landers* appears to require, “An allegation that a plaintiff typically worked a forty-
 25 hour workweek, and worked uncompensated extra hours during a *particular* forty-
 26 hour workweek would state a plausible claim for relief.” *Landers*, 771 F.3d at 644
 27 (emphasis added). Here, the piece-rate system Defendant employed was opaque,
 28 deliberately complicated and confusing. As demonstrated in **Exhibit 1** hereto, piece

1 rate. Plaintiffs contend the piece rates themselves are inaccurate. Yet according to
 2 Defendant, Plaintiffs must present their calculations now, without the benefit of
 3 discovery. Under these particular facts, where the piece rate changed weekly, the
 4 *Landers* requirement is onerous and unreasonable. Thus the Court should deny
 5 Defendant's Motion to Dismiss.

6 Third, and again in the alternative, the Court should allow leave to amend. The
 7 heightened *Landers* standard does not apply in state court – where Plaintiffs filed their
 8 Complaint. Nevada is a notice pleading state and specifically does not follow
 9 *Twombly*. *Garcia v. Prudential Ins. Co. of America*, 129 Nev. 15, 18, fn. 2, 293 P.3d 869,
 10 871 (2013) (citing *Twombly*, 550 U.S. at 570, 127 S. Ct.). Thus it was unnecessary for
 11 Plaintiffs to meet the *Twombly* standard at time of filing. Given these facts, if the
 12 Court does not remand this case, it must give Plaintiffs an opportunity to amend. *See*
 13 *Levert v. Trump Ruffin Tower I, LLC*, No. 2:14-cv-01009-RCJ-CWH, 2015 WL 133792,
 14 at *5 (D. Nev. Jan. 9, 2015) (allowing plaintiffs to amend complaint to cure
 15 deficiencies under *Landers*). To that end, proposed First Amended Complaint is
 16 attached as **Exhibit 1**.

17 Finally, if the Court for some reason denies remand, it should not require the
 18 particularity standard of *Landers* to Plaintiff's state law claims. The cases Defendant
 19 cites to the contrary on not binding upon this Court. In any event, such particularity
 20 is provided in the attached proposed First Amended Complaint. And certainly, where
 21 COLOSIMO and PORTEOUS provided their termination dates, it is enough, for
 22 purposes of NRS §§ 608.020-.050, to say that their final paychecks were insufficient.
 23 Further, contrary to Defendant's argument, see ECF No. 8 at fn. 6, a pre-suit
 24 demand letter is virtually impossible on behalf of a class until discovery begins, and
 25 therefore should be deemed unnecessary.

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28 ///

1 V. CONCLUSION

2 For the foregoing reasons, the Court should deny Defendant's Motion to
3 Dismiss as moot or as a substantive matter, or allow Plaintiffs leave to amend.

4 DATED this 20 day of May, 2019.

5 MADDOX | ISAACSON | CISNEROS LLP

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7
8 By: Barbara McDonald

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 11920 Southern Highlands Parkway, Suite 100, Las Vegas, Nevada 89141.

Pursuant to FRCP 5(b)(3) and LR 5-1, I hereby certify that on this 20th day of May, 2019, I served a true and correct copy of the above document, entitled **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COLLECTIVE AND CLOASS ACTION COMPLAINT, AND MOTION TO AMEND**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.

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Attorney For: Prince Telecom, LLC

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 20, 2019, at Las Vegas, Nevada.

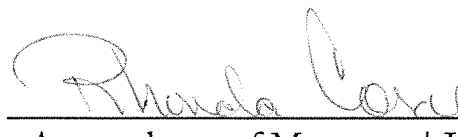

An employee of MADDOX | ISAACSON | CISNEROS LLP

EXHIBIT INDEX

Exhibit 1 - 1st Amended Collective and Class
Action Complaint.